

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant began working as a route salesperson for respondent on November 7, 2002. Approximately two days before November 26, 2002, claimant testified she began having pain. On November 26, 2002, claimant suffered severe cramping in one of her legs as she was loading material in her van. Claimant's pain was sufficiently severe that she was forced to go to the emergency room at St. Francis Health Center in Topeka, Kansas. The medical reports from the emergency room on November 26, 2002, indicate claimant suffered low back pain "from an incident in August where she did repetitive heavy lifting."

There was no mention in the St. Francis emergency room records of work causing this pain.

Claimant contacted her employer and advised them that she was in the emergency room, but failed to advise anyone with respondent that her condition was related to her employment. Claimant's problems continued off and on, with her seeking medical treatment through several health care providers. At no time during her employment with respondent did claimant advise anyone from respondent that her condition was related to her work. Additionally, at no time did she advise any of the health care providers who were providing her treatment that this condition was related to any activities associated with her employment.

Several representatives of respondent testified both before the Administrative Law Judge and by deposition. All denied any knowledge that claimant had suffered any type of work-related injury or accident. Virgil Meinholdt, the company president for respondent, was aware that claimant was having pain, but was led to believe it was related to claimant's thyroid problems. He expressed surprise at this, as he himself had suffered thyroid problems through his life, but had never experienced any extremity pain as a result.

Richard Billinger, the director of southern area operations, was claimant's immediate supervisor and was involved in her hire. He was unaware that claimant had alleged any type of work-related injury. He disputed claimant's allegations that she had to crawl into the van on a regular basis in order to retrieve materials. He testified that most of the material was readily accessible through the various doors on the sides and back of the van, without having to enter the van. He also testified that claimant never advised him that she suffered any type of work-related accident.

Claimant did provide to respondent her November 26, 2002 identification bracelet from the hospital emergency room. However, both Lisa Knight, the receptionist for respondent, and Susan Rettig, the secretary/billing clerk, advised that the bracelet, when it was provided, was not provided in relation to any alleged work-related accident. Ms. Knight testified that the bracelet was provided by claimant to prove that she was at the emergency room, which was why she was not out running her routes. Ms. Rettig testified that even though she received the bracelet, when she inquired of claimant as to what caused her problem, she was never given an answer.

Claimant testified to multiple contacts with various respondent representatives regarding her injuries and how they were associated with her work. However, no respondent representative verified any of claimant's allegations. Additionally, no medical reports discuss a work-related connection to claimant's ongoing problems until substantially after claimant's termination of employment on January 6, 2003. The first notice provided to respondent was on February 17, 2003, when Mr. Meinholdt received a telephone call from a relative of claimant's regarding a workers' compensation claim.

In workers' compensation litigation, it is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.¹

Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to the particular case.²

Neither the medical evidence nor the testimony of the various respondent representatives supports claimant's contentions that she suffered an accidental injury while employed with respondent. The Board finds most damaging the total lack of comment in the medical reports of any work-related connection to her alleged pain. The histories provided to the emergency room personnel and other doctors discuss injuries which occurred at times before claimant's November 7, 2002 start with respondent. The Board finds based upon the evidence presented, that claimant has failed to prove she suffered accidental injury arising out of and in the course of her employment.

K.S.A. 44-520 obligates that claimant provide notice of accident within ten days of the accidental injury. Failure to provide notice within ten days may be overlooked if claimant can prove just cause for failing to provide notice of accident. In this instance, the Board finds claimant did not provide notice of accident within the ten-day limit and further failed to provide any justification for her failure to advise respondent of the alleged accident.

Some factors which may be considered in determining whether just cause exists are:

- (1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually.

¹ See K.S.A. 44-501 and K.S.A. 2002 Supp. 44-508(g).

² *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, rev. denied 235 Kan. 1042 (1984).

- (2) Whether the employee is aware he or she has sustained either an accident or an injury on the job.
- (3) The nature and history of the employee's symptoms.
- (4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident, and whether the respondent has posted notice as required by K.A.R. 51-12-2.

In this instance, claimant alleges a sudden increase in pain on November 26, 2002, which caused her to go immediately to the emergency room at St. Francis Health Center. It is apparent that claimant suffered a short-term, traumatic event which should have alerted claimant to the fact that she had suffered some type of an injury. The conflict arises, in part, from the history provided to the various health care providers being substantially different from claimant's testimony. And finally, respondent's representative, Susan Rettig, testified that workers' compensation notices are posted in the warehouse.

The Board finds that claimant failed to provide notice of accident to respondent within the time limits allowed and that there was no just cause for claimant's failure to so advise respondent of the accidental injury. Therefore, the Board finds that the Order of the Administrative Law Judge denying claimant benefits should be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Bryce D. Benedict dated May 21, 2003, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July 2003.

BOARD MEMBER

c: Beth R. Foerster, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Director